IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1057

Estate of

SALLYE LIPSCOMB FRENCH, JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

On Appeal from the District of Columbia Court of Appeals

MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Leo Pfeffer
15 East 84th Street
New York, New York 10028
(212) 879-4500

Paul S. Berger
1229 - 19th Street N.W.
Washington, D.C. 20036
(202) 872-6784

Attorneys for American Jewish Congress,
Amicus Curiae

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The undersigned, as counsel for the American Jewish Congress, respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the appellees' position that the judgment of the District of Columbia Court of Appeals be affirmed.

Consent to the filing of this brief was obtained from counsel for the appellees but was denied by counsel for the appellant.

The American Jewish Congress is an organization committed to the safeguarding of the Bill of Rights in general, and specifically in this case to the First Amendment's dual guaranty of the separation of church and and state and the free exercise of religion. It has heretofore participated in many appeals before this Court, either as party or as amicus curiae, involving the interpretation and application of the Amendment.

We believe that our experience in dealing with the issues involved in this case enables us to contribute to the resolution by this Court of the important constitutional questions pending before it. Although we have not seen the briefs of the appellees herein, we believe that our brief supplements rather than duplicates theirs.

Wherefore, the amicus moves that the motion to file this brief be granted.

Respectfully submitted,

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500

PAUL S. BERGER
1229 - 19th Street N.W.
Washington, D.C. 20036
(202) 872-6784

Attorneys for American
Jewish Congress,
Amicus Curiae

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Interest of the Amicus

The American Jewish Congress is committed to the principle that the Constitution mandates complete neutrality in respect to the relations of government and religion. Government may not finance religious institutions out of tax-raised funds since that would constitute compulsory support of religion in violation not only of the Establishment Clause but also of the Free Exercise Clause of the First Amendment. Because of this commitment, the American Jewish

Congress has participated, either as party or as amicus, in many cases before this Court challenging laws appropriating tax-raised funds for the support of institutions practicing or teaching religion. It has asserted in all these cases that the First Amendment impels religious institutions to rely for their financial support exclusively upon the uncoerced contributions of their adherents.

We believe, however, that the Amendment forbids not only coercion to support religion but coercion not to support. A law, such as the one involved in this case, which allows a testator to leave his estate or part of it to any nonreligions organization he wishes but limits this right in respect to religious organizations manifests hostility to religion and unjustifiable discrimination against it.

We have participated in many efforts, legislative and executive as well as judicial, towards outlawing religious discrimination in employment, education, housing and public accommodations. It may be that, where such discrimination is practiced by individuals and nongovernmental bodies, it violates no constitutional prohibition. Where, however, it is practiced by government itself, we believe that it violates the Constitution. We are therefore impelled to express our opposition to it in all branches of our government, judicial no less than legislative or executive.

Statute Involved

Section 302 of 18 D.C. Code provides:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator.

The Question to Which This Brief is Addressed

The single question to which this brief is addressed is whether government, federal or state, can, consistently with the Establishment and Free Exercise Clauses of the First Amendment, invalidate testamentary bequests to religious institutions if made within thirty days of the testator's death.

Statement of the Case

The testatrix, Sallye Lipscomb French, executed her Last Will and Testament on October 13, 1972. She died less than 30 days thereafter on November 2, 1972. By the terms of the will, one-third of the residue was left to the Calvary Baptist Church, Washington, D. C., one-third to St. Matthew's (Roman Catholic) Cathedral, Washington, D. C., and one-third to Johns-Hopkins University, the last a secular institution. The decedents' heirs at law challenged the bequests

to the two religious institutions (but not the one to Johns-Hopkins) under the District's mortmain statute, 18 D.C. Code Section 302. The Superior Court of the District of Columbia held that the statute was invalid as constituting an unconstitutional infringement of the Free Exercise Clause of the First Amendment. Jurisdictional Statement, p. 8b.

The judgment of the Superior Court was unanimously affirmed by the Court of Appeals of the District of Columbia in an opinion by Associate Judge Mack holding that "the due process clause of the Fifth Amendment requires that the statute not be given effect in the administration of estates in the District of Columbia" in that it denies to religious testamentary beneficiaries the equal protection of the laws. Jurisdictional Statement, p. 9a. Retired Chief Judge Reilly concurred in an opinion asserting that the decision should have been based on the Religion Clauses of the First Amendment rather than the Due Process Clause of the Fifth. Jurisdictional Statement, pp. 9a - 10a.

Summary of Argument

I. The challenged statute violates the Establishment Clause of the First Amendment, whether that Clause is interpreted as the Court did in Everson v. Board of Education, 330 U.S. 1 (1947) and other cases, or whether it is interpreted as the Court did in Meek v. Pittenger, 421 U.S. 349 (1975) and other cases. It violates the Everson test because

it involves the government in religious affairs, influences profession of belief or disbelief in religion, and constitutes unneutrality between religion and non-religion. It violates the Meek test in that it has a primary effect of inhibiting religion.

II. The challenged statute also violates the Free Exercise Clause in that it effectively restricts both the right of persons to leave property to religious institutions as required by their religious conscience and the right of religious institutions to receive such bequests. While no freedom secured by the First Amendment is or can be absolute, the burden of justifying the validity of a law infringing upon First Amendment freedoms, and particularly freedom of religion, is a substantial one and rests upon the party defending the law. That burden has not been met in this case.

ARGUMENT
POINT I

THE MORTMAIN STATUTE CHALLENGED IN THIS CASE IS AN UNCONSTITUTIONAL LAW RESPECTING AN ESTABLISHMENT OF RELIGION.

A. Preliminary Statement

The term "mortmain" is generally used to denote the alienation of lands or tenements to any nonprofit or charitable corporation, ecclestiastical or temporal. Mortmain acts had as their purpose the prevention of accumulation of lands by primarily religious corporations. Blackstone, in explaining

these acts, noted that, "as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those who, according to the superstitions of the times, could intercede for their happiness in another world." Commentaries on the Laws of England (Beacon Press (1962 ed.)), p. 347.

It is important to note initially that this case does not involve the constitutionality of all mortmain statutes still in force in the United States, but only that of the District of Columbia, which appears to be unique in this country. As indicated in the opinion of the Court of Appeals (Jurisdictional Statement, p. 4a, footnote 2), seven other jurisdictions still have statutes similar to the one challenged in the present case, but only the latter restricts testamentary gifts to religious institutions; the others restrict substantially all charitable gifts made within a certain period before death. In this brief, we take no position on the validity of mortmain statutes generally but only upon the statute here in issue which singles out religious institutions as ineligible testamentary beneficiaries.

It should also be noted that the challenged statute makes no distinctions in respect to the age of the testator, his mental capacity at the time of death, or the manner of his death. It applies equally to the will of the superannuated and to that of a person in his thirties or forties in full possession

of his mental faculties who suffers accidental and unforseeable death within thirty days after executing a will.

Finally, it should be noted -- a point to which we will return in Part II of this brief -- that the invalidation of the challenged statute in no way limits the right of disappointed heirs to challenge the validity of the decedent's will on the ground that decedent at the time the will was executed was in actual fact not of sound mind or was the subject of undue influence.

B. The Everson Test and Neutrality

In Everson, the Court said (330 U.S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may adopt to teach or practice

> religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

This careful exposition of the meaning of the constitutional clause was repeated and reaffirmed in McCollum v. Maryland, 333 U.S. 201 at 210 - 211 (1948); McGowan v. Maryland, 366 U.S. 420 at 443 (1961) and Torcaso v. Watkins, 367 U.S. 488 at 492-493 (1961).

We submit that the District's mortmain statute cannot stand under the Everson test. It is a law respecting an establishment of religion as that constitutional provision was interpreted in the Everson and other cases. It involves the government in religious affairs for it decides what an individual may or may not give to a religious institution and when he may or may not give it. It forces a testator to profess a disbelief in any religion, or at least prevents him from expressing a belief in religion through making a contribution to it that takes effect upon his death. Above all, it violates the mandate of neutrality between religion and non-religion.

It is noteworthy that in all the cases in which this Court applied the Everson test

in whole or in part, [1] the challenged statutes were asserted to be in aid of religion. This was so because, as has often been noted, the American people and their governmental bodies have been friendly rather than hostile to religion. See, e.g., Zorach v. Clauson, 343 U.S. 306 at 313-314 (1952); Board of Education v. Allen, 392 U.S. 236 (1968). In all these cases, however, the Court has interpreted the Establishment Clause of the First Amendment to mandate neutrality as to religion, not hostility. As it said in Everson (330 U.S. at 18):

> That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

There have been many cases in which the Court was called upon to pass judgment on governmental action, legislative, executive or judicial, against a particular unpopular sect such as the Mormons or Jehovah's Witnesses. See, e.g., Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Cantwell v. Connecticut, 310 U.S. 296 (1940). In addition, it has considered (but consistently rejected) claims that judicial decisions invalidating Bible reading or prayer

1. See, eg.g., Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, at 780 (1973).

recitation in the public schools or governmental aid to parochial schools are unneutral and hostile to religion in general.[2] There appears, however, to have been only one case in which this Court was called upon to decide whether enforcement of the terms of a decedent's will restrictive of religion would manifest government hostility to religion and, hence, under the Everson test, would today constitute a violation of the Establishment Clause.

That case was Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844), in which the Court was called upon to decide the validity of a will in which the testator bequeathed a substantial estate for the purpose of establishing an educational institution for orphans, with the proviso, among others, that "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated for the purposes of the said college." Girard's heirs attacked the will and argued, in the words of their attorney, Daniel Webster, that the "plan of education is derogatory to the Christian religion, tending to weaken men's respect for it and their conviction of its importance. It subverts the only foundation of public morals, and therefore, it is mischievous and not desirable" (Ibid at 173). The Court rejected the con-

2. See, e.g., McCollum v. Board of Education, 333 U.S. 203, at 212-213 (1948).

tention and, translated into contemporary constitutional concepts, held that the state's enforcement of the will was consistent with judicial mandates of neutrality.

The present case is the converse of Vidal. It is not the decedent's testament but the statute of the District of Columbia which seeks to exclude religious institutions as beneficiaries in her estate. The constitutional principle, however, is the same: as the law may not compel inclusion of religious institutions as beneficiaries of a decedent's estate, neither can it compel their exclusion.

C. The Purpose-Effect-Entanglement Test

In a number of cases, traceable to McGowan v. Maryland, 366 U.S. 420 (1961), and culminating as of the present writing in Meek v. Pittenger, supra, the Court evolved what has become known as the purpose-effect-entanglement test of validity upon the Establishment Clause. See, Abbington School District v. Schempp, 374 U.S. 203 (1963); Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education and Religious Liberty (PEARL) v. Nyquist, 413 U.S. 756 (1973). This three-part test for validity was expressed as follows in Meek v. Pittenger (421 U.S. at 358):

> First, the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion.

The purpose-effect-entanglement test is not a repudiation of the Everson test, as is evidenced by the fact that practically every decision of this Court which refers to and applies the former test also cites Everson. Basically, it is neither more nor less than a re-phrasing of the essential elements of the Everson test. In any event, whatever the case may be, the District's mortmain statute can no more survive challenge under the later formulated test than it can under the earlier Everson test.

Limiting ourselves to the second of the three-prong purpose-effect-entanglement test, it is clear that whatever may have been the purpose of those who formulated and promulgated the first mortmain law (although it can hardly be doubted that their purpose was to inhibit the acquisition of wealth by churches), or of those who adopted the statute here in issue, that statute does have a primary effect that inhibits religion. It inhibits the religion of the testatrix which impels her to make the challenged bequests, mandated as they are by her religious conscience; and it inhibits the religion of the ecclesiastical beneficiaries in that it deprives them of moneys committed to them for the preservation and propagation of their respective religions. As such, we submit, it cannot survive challenge under the purpose-effect-entanglement test.

POINT II

THE MORTMAIN STATUTE CHALLENGED IN THIS CASE IS AN UNCONSTITUTIONAL LAW PROHIBITING THE FREE EXERCISE OF RELIGION.

A. Preliminary Statement

Initially, we note that there may be instances where the ban on laws respecting an establishment of religion and those prohibiting its free exercises are or appear to be in conflict with each other. See, e.g., Walz v. Tax Commission, 397 U.S. 644 (1970); Wisconsin v. Yoder, 406 U.S. 205 (1972). Whether or not these cases present real conflict is by no means certain but, if they do, they constitute the exception rather than the rule. Those who wrote our Constitution and Bill of Rights conceived the separation of church and state and religious freedom as a unitary principle. To them, notwithstanding occasional instances of apparant conflict, separation guaranteed freedom and freedom required separation. The decisions of this Court confirm that conclusion; in the great majority of cases, the dual guaranties of the Amendment support rather than conflict with each other. See, e.g., Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Torcaso v. Watkins, 367 U.S. 488 (1961). The present case is one of these.

We note further that it is entirely irrelevant to the determination of the constitutional issues raised in this case whether either the bequeathing of property or the receipt of it by will is a right or a

privilege (see Irving Trust Co. v. Day, 314 U.S. 556 (1942)). The First Amendment makes no distinctions between rights and privileges. Governmental exclusion of a person from a class entitled to benefits because of his religion violates the Free Exercise Clause whether that benefit be designated a right or a privilege. Torcaso v. Watkins, 367 U.S. 488 (1961). As the Court said in Sherbert v. Verner, 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." If, as in Torcaso, a person may not be constitutionally barred from becoming a notary public because of his religion or lack of it or, as in Sherbert, barred from receiving unemployment insurance benefits because of his refusal to violate his religious beliefs by working on his Sabbath, he cannot be barred from bequeathing or inheriting property because of his religious beliefs or practices.

B. The Meaning of Free Exercise

Just as during the past decade there has been a reformulation of the meaning of the Establishment Clause so has there been a reformulation of the meaning of the Free Exercise Clause. Here too the reformulation was not intended to and did not lessen the protection accorded to religious freedom. Indeed, if there is any difference in substance between the earlier and later formulation it is clear that the later one accords a greater degree of protection to the free exercise of

religion.

In the earlier cases, the Court applied to challenges under the Free Exercise Clause the same test applicable to the Free Speech Clause; that is, the clear and present danger test. It was recognized that the religious freedom guaranteed by the First Amendment did not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940). The First Amendment did not preclude proscription of polygamy, breaching of the peace, or child labor. Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944).

Nevertheless, when the Court considered the validity of legislation regulating rights secured by the First Amendment, it did not apply the usual presumption of constitutionality. It recognized rather, "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 530 (1945); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Prince v. Massachusetts, supra, 321 U.S. at 164. Hence, "any attempt to restrict these liberties must be justified by clear public interest threatened not doubtfully or remotely, but by clear and present danger." Thomas v. Collins, supra, 323 U.S. at 530. See also West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624 at 639 (1943).

More recently, beginning with Sherbert v. Verner, supra, the Court in First Amendment cases has spoken in terms of compelling interest. Like the clear-and-present danger test, the compelling-interest test is based on the premise that the liberties protected by the First Amendment are fundamental in our constitutional democracy and therefore stand in a preferred position in our scale of values. Hence, as the Court said in Sherbert, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

The trend of the Court's decisions in applying the compelling interest test has been toward broad interpretation and application of the Free Exercise Clause.[3] Thus, in Sherbert, the Court held that a denial of unemployment benefits because of a woman's refusal to accept a position that required her to work on Saturday, violated the Free Exercise Clause. In the case of In re Jenison, 375 U.S. 14 (1963), it held that a woman whose conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L. Rev. 1115 (1973).

Clause, be held in contempt of court. And in Wisconsin v. Yoder, supra the Court held that the Free Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious conscience would not allow them to send their children to secondary schools. In the latter case, the Court summarized its earlier decisions as establishing (at 215): "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

In sum, under the present interpretation of the Free Exercise Clause, government, state or federal, can restrict the expression or exercise of religion only by showing (1) that there is a counter governmental interest of such importance as to be deemed compelling and (2) that there is no alternative for its protection other than the limitation on the free exercise of religion.

We submit that, however the test is formulated, the challenged statute cannot be upheld under the Free Exercise Clause. It is invalid under that Clause both as to the testatrix and as to the religious beneficiaries. It effectively restricts the right of persons to leave property to religious institutions as required by their conscience and the right of the latter to receive such bequests. While no freedom secured by the First Amendment is or can be absolute, the burden of justifying the validity of a law restricting the free exercise of religion rests upon the party defending it. The

obligation of justifying the challenged mortmain statute has not been met in this case.

C. Validity as to the Testatrix

As we have noted, the invalidation of the mortmain statute in no way limits the right of disappointed heirs to challenge the validity of the decedent's will on the ground that, at the time of its execution, she was not in actual fact of sound mind or in full command of her mental capacities. Nor does it limit the right of the heirs to establish that the religious beneficiaries did in fact exercise undue influence upon her, as that term is understood in respect to testamentary dispositions to beneficiaries other than churches.

It can hardly be doubted that a testamentary disposition of property to a church is an exercise of religion within the meaning of the First Amendment. What clear and present danger warrants infringement upon this freedom? What counter governmental interest is of such importance as to be deemed compelling? What showing has been made that, if such an interest exists, it cannot be protected by means other than the limitation on the decedent's free exercise of her religion?

The District statute, unlike other mortmain laws, singles out religious institutions or personnel as disqualified legatees. This fact indicates that the framers of the law believed that, even in absence of proved undue influence, a person on his death bed would be so concerned about his rewards and

and punishments in a future life that efforts to purchase entry into heaven or avoid consignment to hell must as a matter of law render him legally incompetent to make a full disposition of his estate as he sees fit. Presumably, the assumption is that, while such a prediction of afterlife may be valid if made more than thirty days before death, it is vulnerable if made within that period.

But what if the testator is right and the lawmakers wrong? Can the state then redeem him from hell? If there is anything the First Amendment forbids, it is governmental determination as to which religious beliefs are true and which false. The government may not determine, for example, that saluting the flag is really not a form of idolatry forbidden by the Bible and that engaging in the practice would not result in an afterlife in hell. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). By the same token, it may not adjudge that contributions to a particular church or religion will not purchase a happy afterlife.

That is what this Court held in United States v. Ballard, 322 U.S. 78 (1944), setting aside a conviction for obtaining property under the false pretense that a happy after-life could be purchased by contributions to the defendants' church. Particularly apposite to the present situation is the following from the Court's opinion in that case (322 U.S. at 86-67):

> ...Heresy trials are foreign to our Constitution. Men may believe what

they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedoms...

In his monumental Virginia Act for Establishing Religious Freedom, Jefferson stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical" and a denial of "one of the natural rights of mankind." So, too, we suggest, is compelling him not to furnish contributions for the propagation of opinions in which he does believe.

D. Validity as to the Churches

The second justification for mortmain laws - the only one that the believing

generations which originated these laws could acknowledge - is the prevention of excessive accumulation of property and wealth by churches. Such accumulation, it is feared, by withdrawing substantial properties from the tax rolls under the tax exemption privilege enjoyed by churches, either deprives the government of needed revenue or results in an inordinate burden on the non-exempt property owners.

In may be conceded that this explanation might provide prima facie justification for the distinction made in the challenged statute between testamentary contributions to churches and those to nonreligious philanthropic institutions. In respect to the latter, the testamentary bequests relieve the government in part of its burden in financing nonreligious charitable, scientific or educational services or institutions, whereas the Establishment Clause forbids the government to practice religion or finance religious institutions. In Walz v. Tax Commission, 397 U.S. 664 (1970), however, the Court noted that many if not most churches do engage in substantial nonreligious charitable functions such as providing hospital care for the poor. While this fact was not used by the Court as constitutional justification for tax exemption to churches, it does furnish support for the claim that the state may not interfere through mortmain laws with the efforts of churches to obtain funds necessary for providing these religiously neutral charitable services.

The difficulty with the justification of mortmain laws as a means to prevent excessive accumulation of properties by churches is that it is simultaneously too broad and too narrow. It is too broad because it encompasses testamentary bequests equally to poor and to rich churches. As Anatole France noted, it is only superficial justice which impartially forbids both the poor and the rich to sleep under bridges. It is too narrow because it is limited to testaments executed within thirty days of death. If there is a valid fear of excess accumulation of wealth by churches, the appropriate means of meeting the problem is forbidding accumulation above prescribed limits, no matter how or when that accumulation is effected.

Finally, the difficulty with this justification for mortmain laws is that, even to effect a legitimate end, the Constitution imposes on government a mandate to utilize means which least infringe upon constitutionally protected rights. In the Walz case, the Court upheld the constitutionality of tax exemption for churches, but neither in that decision nor in any other did it intimate that the Constitution forbids nondiscriminatory taxing of the property of churches, or at least their income-producing business property. Cf. Diffenderfer v. Central Baptist Church of Miami, 404 U.S. 412 (1972). Indeed, as to the latter, many if not most states do in fact, impose such taxes. See

ibid.[4] It is one thing to require churches to pay these taxes as everybody else does; it is another, and completely inconsistent thing to preclude churches from acquiring moneys and properties as everybody else does. It may be that, given the choice, some churches

4. As noted in the following from the Religious News Service of May 29, 1969, the organizations most representative of Protestant, Catholic and Jewish religious opinion favor denial of tax exemption on the income-producing properties of religious organizations:

> The National Council of Churches, composed of 33 Protestant and Orthodox Churches, and the Roman Catholic bishops of the U.S. have asked the federal government to end church tax exemption on income received from businesses unrelated to religion.
>
> The unprecedented move was announced here and in Washington, D.C., and sent to the House Ways and Means Committee, now writing draft legislation on tax reforms...
>
> The request to the government came after several months of negotiations involving Catholic and NCC leaders, in consultation with the Synagogue Council of America. The Jewish organization, composed of all three major branches of Judaism in the nation, was expected to consider approval in early May.

would opt for continued tax exemption rather than nullification of mortmain laws, but that fact is hardly material in passing upon the constitutionality of such laws. What is material is that nondiscriminatory taxation of business property of churches does not violate the Free Exercise Clause but discriminatory deprivation of the right to acquire such property by will does.

Conclusion

For the reasons set forth, the judgment appealed from should be affirmed.

Respectfully submitted,

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500

PAUL S. BERGER
1229 - 19th Street N.W.
Washington, D.C. 20036
(202) 872-6784

Attorneys for American
Jewish Congress,
Amicus Curiae

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